2000

State of Utah v. Paul Christopher Allen : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff / Appellee, v. PAUL CHRISTOPHER ALLEN, Defendant / Appellant.	)	Case No. 20000531-SC (2)

REPLY BRIEF OF APPELLANT

Appeal from Order denying Defendant's Motion for New Trial entered May 16, 2000, in Second District Court, the Honorable Glen R. Dawson, presiding

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ARGUMENT

I. THE TRIAL COURT IMPROPERLY ADMITTED THE EVIDENCE OF MR. ALLEN'S FRAUDULENT CREDIT-CARD PURCHASES INASMUCH AS THOSE PURCHASES CONSTITUTED EXTRINSIC EVIDENCE FOR THE SOLE PURPOSE TO DEMONSTRATE CHARACTER.

In its Brief, the State argues that the evidence of Mr. Allen's fraudulent-credit purchases constituted intrinsic evidence that does not implicate the purposes of Rule 404(b). *See* Brief of Appellee, pp. 21-22. According to the State, the evidence of Mr. Allen's fraud demonstrated his role in the conspiracy to commit his wife's murder. *Id.* at 23-25. Neither case law nor the evidence presented during trial support the State's contentions.

In support of its contention that acts committed in furtherance of a conspiracy are not extrinsic evidence for purposes of Rule 404(b), the State cites *United States v. Nichols*, 374 F.3d 959 (10th Cir. 2004). *Id.* at p. 21. According to *Nichols*, "Other act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are *inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.* *Nichols*, 374 F.3d at 1007 (emphasis added) (quoting *United States v. Lambert*, 995 F.2d 1006, 1007 (10th Cir.), 510 U.S. 926, 114 S.Ct. 333 (1993)).

In this case, the fraudulent credit-card purchases are not inextricably intertwined with the alleged conspiracy to commit murder. Rather, the record demonstrates no relationship whatsoever between the fraudulent credit-card purchases and the alleged conspiracy to commit the murder of Jill Allen. Furthermore, other than the self-serving testimony of Joey Wright,[1] the State presented no evidence that the fraudulent credit-card purchases were part of the alleged conspiracy to commit murder as a single criminal episode. In fact, other than Wright's testimony, no evidence was presented that the credit-card fraud was part of the alleged conspiracy to commit murder. Wright

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[1]On cross-examination, the following testimony was elicited from Joey Wright about his willingness to lie about good friends:

COUNSEL: Now, in that regard, being a good friend of yours doesn't always necessarily mean that you won't cheat on your friend, correct?
WRIGHT: That's correct.
COUNSEL: In fact, being Joey Wright's friend may mean that Joey Wright will do what he can to get over on a friend as well, correct?
WRIGHT: That's correct.
COUNSEL: What do you mean by getting over on people?
WRIGHT: Stealing from them. Taking from them.
COUNSEL: Lying to them?
WRIGHT: That's correct.
COUNSEL: Lying about them, if necessary?
WRIGHT: If it's to my advantage, yes.
* * * *
COUNSEL: You've lied before, Mr. Wright?
WRIGHT: Yes, I have.
COUNSEL: We don't know whether you will lie again, correct, Mr. Wright?
WRIGHT: It's true.

(R. 2053: 755-56; R. 2053:758:5-9).

claimed that Mr. Allen told him about the fraudulent purchases but neither Wright nor any of the alleged co-conspirators had any involvement in the fraudulent credit-card purchases.

Finally, in light of State's inability to demonstrate any nexus between the fraudulent credit-card purchases and the alleged conspiracy to commit the murder, it failed to prove that the acts of credit-card fraud were necessary preliminaries to the alleged murder conspiracy. Consequently, the fraudulent credit-card purchases are extrinsic evidence and fall directly within the scope of Rule 404(b). *See United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995) (stating "intrinsic evidence" is evidence "which is inextricably intertwined as 'an integral part of the immediate context of the crime charged.'").

The State's argument that the fraudulent credit-card purchases are intrinsic evidence of the conspiracy to commit murder is an attempt to bootstrap the unrelated fraudulent acts of Mr. Allen to the conspiracy to commit murder. *See* 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5239, at 452 (1978) (warning that justifying the admissibility of criminal transactions "on the ground that they were part of the conspiracy" presents "a danger here of bootstrapping that will completely undermine the policy of Rule 404(b)"). Simply because the State argues that the fraudulent credit-card purchases were

part of the history of the conspiracy to commit murder is not an adequate ground for the admission of other crimes evidence. *See United States v. Sullivan*, 919 F.2d 1403, 1416 (10th Cir. 1990); *see also United States v. Arana*, 182 F.R.D. 236, 240 (E.D. Mich. 1998), *aff'd*, 51 Fed. Appx. 488 (6th Cir.), *cert. denied*, 537 U.S. 1076, 123 S.Ct. 667 (2002). The State must provide some probative purpose for admission of the fraudulent credit-card purchase evidence, which, for the previously discussed reasons, is wholly lacking in the instant case. *Sullivan*, 919 F.2d at 1416.

A. The Evidence of Mr. Allen's Fraudulent Credit-Card Purchases Provided No Proof of the Monies Allegedly Paid to Mr. Wright.

The State's argument that the fraudulent credit-card purchases provided proof of Mr. Allen's role in the conspiracy to commit murder by accounting for monies paid to Wright is not supported by the record on appeal. In the course of direct examination, Wright testified that Mr. Allen paid him by way of cash payments in various amounts over the course of several months from April or May 1996 to approximately October of that same year (R. 2053:610-621). None of the dates or amounts provided by Wright in his testimony even approximate the dates upon which the fraudulent credit-card purchases occurred or the amounts of the

purchases.[2] *See* State's Exhibits G20 through G28 attached as Addendum E to the Brief of Appellant.

In the course of its motion in limine for the admission of the fraud evidence, the State argued that the purpose of the evidence of the fraudulent credit-card purchases was to show how Mr. Allen created a scheme to disguise the flow of money to Wright, and to corroborate Wright's testimony of a conspiracy (R. 589). However, as previously discussed, the record reveals no connection between the fraudulent credit-card purchases and a scheme to disguise the alleged payment of monies to Wright. The State presented no evidence that Mr. Allen had reason to conceal from anyone the manner in which he spent money. Rather, the testimony at trial demonstrates that Jill Allen participated in at least one of the fraudulent credit-card purchases of golf equipment (R. 2058:1658-59). Furthermore, two of the fraudulent acts occurred after the murder. *See* State's Exhibits G26, G27, and G28 attached as Addendum E to the Brief of Appellant.

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[2]Not only did none of the dates or amounts provided by Wright correspond to the alleged payments from Mr. Allen, the State's financial expert witness conceded that there was no "line by line relationship" between the cash withdrawals by Mr. Allen and the alleged payments to Wright (R. 2056:2-12).

B. The Evidence of Mr. Allen's Fraudulent Credit-Card Purchases Provided No Corroboration of Mr. Wright's Testimony.

At trial, Joey Wright testified that Mr. Allen had told him that the money paid to him would be accounted for by purchases with stolen credit cards (R. 2053:643:11-21). However, the State failed to make any connection between the fraudulent credit-card purchases and the money allegedly paid to Wright. In fact, the State presented only a very small amount of the fraudulent credit-card evidence through the testimony of Joey Wright. Rather, the State elicited and emphasized evidence of Mr. Allen's fraudulent credit-card transactions by way of the testimony from Sergeant John Herndon of the North Salt Lake Police Department (*See, e.g.*, R. 2055:994-96). The State then emphasized the fraudulent credit-card transactions by the introduction of documentary evidence (*See* R. 2056:1208-11).[3] Those documents or Exhibits included the State's Exhibit G-20 through G-28;[4] State's Exhibit G-29 (Cell phone records showing calls from Mr. Allen's cell phone to The Bombay Company); and (State's Exhibit G-30 (Cell phone records showing call from Mr. Allen's cell phone to Uinta Golf)).

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[3]The fraudulent credit-card transaction documents were presented by way of overhead projector to the jury (R. 2056:1211:15).

[4]A copy of State's Exhibits G-20 through G-30 are attached as Addendum E to the Brief of Appellant.

II. THE TRIAL COURT IMPROPERLY ADMITTED THE EVIDENCE OF MR. ALLEN'S FRAUDULENT CREDIT-CARD PURCHASES UNDER RULE 404(b).

Having demonstrated that the evidence of Mr. Allen's fraudulent credit-card transactions is extrinsic evidence that falls directly within the rubric of Rule 404(b), the issue before the Court is whether the trial court abused its discretion by admitting such evidence under Rule 404(b). Prior to deciding whether evidence of other crimes, wrongs, and bad acts is admissible under Rule 404(b), the State is correct that "the trial court *must* first determine (1) whether such evidence is being offered for a proper, noncharacter purpose under 404(b), (2) whether such evidence meets the requirements of rule 402, and (3) whether this evidence meets the requirements of rule 403." *State v. Decorso*, 1999 UT 57, ¶20, 993 P.2d 837 (italicized emphasis added); *see also State v. Nelson-Waggoner*, 2000 UT 59, ¶¶18-20, 6 P.3d 1120. The "admission of prior crimes evidence itself must be scrupulously examined by trial judges in the proper exercise of that discretion." *Decorso*, 1999 UT 57 at ¶18 (citation omitted).

In the course of ruling that evidence of Mr. Allen's fraudulent credit-card transactions were admissible, the trial court concluded "that *if the State's evidence comes in as they anticipate*, the evidence would be relevant for an appropriate purpose and non-character purpose; that is, intent, preparation,

plan and knowledge." (italicized emphasis added) (R. 2062:7:13-16).[5] However, as demonstrated above, the State, in the course of presenting evidence of Mr. Allen's fraudulent credit-card transactions, failed to establish any connection between the fraud and the alleged conspiracy to commit the murder of Jill Allen. Consequently, the evidence presented by the State of the fraudulent acts committed by Mr. Allen was not offered for a non-character purpose as required by Rule 404(b).

In its bench ruling, the trial court also concluded that the State's fraud evidence was relevant "to showing the conspiracy element as some evidence supportive of the agreement to commit murder." (R. 2062:8:1-4). However, the State's evidence of Mr. Allen's criminal and fraudulent acts does not satisfy the requirements of Utah Rule of Evidence 402. According to Rule 402, "[e]vidence which is not relevant is not admissible." Utah R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401. "Other crime evidence is admissible if it 'tends to prove some fact that is material to the crime charged--other than the

[5]The trial court's bench ruling is attached as Addendum D to the Brief of Appellant.

defendant's propensity to commit crime.'" *State v. Bluff*, 2002 UT 66, ¶56, 52 P.3d 1210. In light of the State's failure to demonstrate any connection between the fraudulent transactions and the alleged conspiracy to commit murder, the evidence of Mr. Allen's fraudulent credit-card purchases did not tend to prove some fact that is material to the charged conspiracy to commit Jill Allen's murder. Instead, the record evidence of the fraudulent credit-card purchases demonstrates that those fraudulent acts were anything but an integral part of the alleged conspiracy to commit murder.

III. THE TRIAL COURT FAILED TO CONDUCT THE REQUISITE BALANCING TEST UNDER UTAH RULE OF EVIDENCE 403 PRIOR TO ADMITTING THE EVIDENCE OF MR. ALLEN'S FRAUDULENT CREDIT-CARD PURCHASES.

"Finally, the trial court must determine whether the bad acts evidence meets the requirements of rule 403 of the Utah Rules of Evidence." *State v. Nelson-Waggoner*, 2000 UT 59, ¶206 P.3d 1120. "Rule 403 excludes relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *State v. Widdison*, 2001 UT 60, ¶41, 28 P.3d 1278 (quoting Utah R. Evid. 403). In *State v. Shickles*, 760 P.2d 291 (Utah 1995), this Court stated:

> In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters *must be considered*, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Id. at 295-96 (quoting E. Cleary, *McCormick on Evidence* § 190, at 565 (3d ed. 1984) (emphasis added)).

Contrary to the State's bald assertions, the trial court failed to perform the requisite balancing under Utah Rule of Evidence 403 prior to admitting evidence of the fraudulent credit-card purchases by Mr. Allen. Without any real consideration of the matters to be considered in the course of performing a Rule 403 balancing, the trial court essentially concluded that the probative value of the fraud evidence was not substantially outweighed by prejudice (R. 2062:8-9).[6] This unsupported conclusion is of critical importance because it unduly restricted the scope and applicability of the requisite Rule 403 balancing. *See United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988) (providing detailed analysis of trial court's failure to perform Rule 403 balancing).

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[6]The trial court's bench ruling and Rule 403 analysis, or lack thereof, is attached as Addendum D to the Brief of Appellant.

The record lacks any indication that the trial court performed the required balancing test. Further, the burden of demonstrating that the balancing test favors admission lies on the State. *Cf. State v. Banner*, 717 P.2d 1325, 1334 (Utah 1986). Without evidence that the trial court examined and properly considered the various factors outlined by the Court in *Shickles*, the trial court erred in admitting evidence of Mr. Allen's fraudulent credit-card purchases.

Mr. Allen's acknowledgment that he committed the fraudulent acts increased the likelihood that the jury would focus on his fraudulent acts instead of the State's burden of proving the alleged conspiracy beyond a reasonable doubt. *State v. Saunders*, 1999 UT 59, ¶15, 992 P.2d 951 (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970)). This, in turn, increased the danger that the jury felt that Mr. Allen should be punished for his acts of fraud even if the evidence of his alleged involvement in the conspiracy to commit murder is not beyond a reasonable doubt. Consequently, the conclusiveness increased the likelihood that the jury would and did convict Mr. Allen based on his criminal character or propensity to commit bad acts.

There were no similarities between the crimes. In fact, the State failed to establish any connection between the fraudulent activity and the alleged conspiracy. Moreover, the interval of

time factor and the lack of any corresponding relationship between Mr. Allen's fraudulent acts and the alleged payments to Wright demonstrate the low or nonexistent probative value of the fraudulent credit-card transactions.

The trial court failed to consider, as a Rule 403 factor, that the need for the evidence as well as the efficacy of alternative proof was extremely low in the instant case. Not only did Joey Wright identify Mr. Allen as a co-conspirator in the murder by testifying that he received numerous cash payments both before and after the murder, but Joey Wright's spouse, Jenny Wright, and Tony Taylor testified against Mr. Allen as well. Consequently, the extremely prejudicial evidence of Mr. Allen's fraudulent and criminal conduct was unnecessary to the State's case, especially when considered in light of the danger of unfair prejudice, confusion of the issues, or misleading the jury based solely on Mr. Allen's criminal character or propensity to commit bad acts.

Two concerns are expressed by the first sentence of Rule 404(b): First, that the jury may convict a defendant as a "'bad man' who deserved to be punished -- not because he is guilty of the crime charged but because of his prior or subsequent misdeeds;" and second, "that the jury will infer that because the accused committed other crimes, he probably committed the crime

charged." *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979); *see also Saunders*, 1999 UT 59 at ¶15.

"Because '[e]vidence of prior criminal acts is almost always prejudicial to the defendant,' the use of such evidence must be carefully circumscribed to protect the defendant from unfair prejudice." *United States v. Sullivan*, 919 F.2d 1403, 1416 (10th Cir. 1990) (quoting *United States v. Shephard*, 739 F.2d 510, 513 (10th Cir. 1984)). Three types of prejudice, at the very least, arise from the admission of other crimes evidence such as the fraudulent credit-card purchases in the instant case. *State v. Peterson*, 696 P.2d 387, 393 (Kan. 1985). "First, a jury might well exaggerate the value of the other crime[s] . . . as evidence inferring that, because a defendant has committed a similar crime . . . before, it can be concluded that he committed this one." *Id.* "Second, the jury might conclude that the defendant deserves punishment because he has been a wrongdoer in the past even where the moving party has failed to establish by the proper burden of proof that the defendant has committed the act for which he is now being tried." *Id.* "Third, the jury might conclude that, because of the defendant's past acts, the evidence on his behalf should not be believed." *Id.*

Here, the trial court, by not conducting the requisite Rule 403 balancing, failed to carefully circumscribe the State's use of

Mr. Allen's fraudulent credit-card transactions in order to protect Mr. Allen from unfair prejudice. Consequently, as specifically discussed above, the aforementioned three types of prejudice resulted from the admission of the fraudulent credit-card transactions. Empirical research demonstrates that the joinder of offenses is prejudicial towards the defendant. *See* Kenneth S. Bordens and Irwin A. Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law and Hum. Behav. 339, 349 (1985).[7] The applicability of this research to other crimes evidence and Rule 404(b) is equally efficacious. According to the research, "Defendants are more likely to be convicted on a given charge when that charge is tried within the context of a joined rather than severed trial." *Id.* at pp. 349-50. "In general, there is evidence to show that jurors do confuse and accumulate evidence and do draw criminal personality inferences in joined trials." *Id.* at p. 350. Furthermore, empirical research generally demonstrates that limiting jury instructions in joinder-of-offense situations do not influence qualified jurors' judgments and tend to be ineffective. *See* Sarah Tanford, Steven Penrod, and Rebecca Collins, *Decision Making in*

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[7]A copy of Kenneth S. Bordens and Irwin A. Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law and Hum. Behav. 339 (1985) is attached hereto as Addendum A.

Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions, 9 Law and Hum. Behav. 319, pp. 333-34 (1985).[8]

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DETERMINING THAT THE "LIE DETECTOR" REFERENCE WAS INNOCUOUS AND THEREBY DENYING THE FIRST MOTION FOR A MISTRIAL.

The State argues that the trial court correctly found that the "lie detector"[9] reference did not prejudice Mr. Allen, and therefore, the trial court did not abuse its discretion by denying the first motion for a mistrial. *See* Brief of Appellee, pp. 31-37. By so arguing, the State asserts that *State v. Eldredge*, 773 P.2d 29 (Utah 1989), is inapposite to the instant case.

In *State v. Eldredge*, 773 P.2d 29 (Utah 1989), this Court, in the course of addressing the admissibility of polygraph evidence, acknowledged the insufficient reliability of polygraph data and the tendency for the fact finder to be overawed by such. *Id.* at 37. The unreliable nature of polygraph evidence and its tendency

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[8]A copy of Sarah Tanford, Steven Penrod, and Rebecca Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Hum. Behav. 319 (1985) is attached hereto as Addendum B.

[9]The term "lie detector" is arguably more egregious than "polygraph". This is especially true in the instant case where the testimony of Wright prior to the initial "lie detector" reference involved allegations that he and Mr. Allen had "faked" their conversations over the telephone, "talking of our innocence." (R. 2053:644-45).

to result in the abdication by the fact finder of its truth-finding function is directly relevant to the instant case. Moreover, the "lie detector" references, without any polygraph results or explanation as to why the results of such an exam were not admitted, are more egregious.

The "lie detector" reference by the State's star witness, Joey Wright, allowed the jury to speculate about why the results of Mr. Allen's supposed polygraph examination were not placed into evidence or even discussed at trial. This in turn allowed the jury to conclude that Mr. Allen was trying to hide the negative results of the "lie detector" test.

The "lie detector" reference by Joey Wright was exacerbated by the prosecutorial misconduct of allowing the comment to be brought to the attention of the jury a matter that it would not be justified in considering in determining its verdict. *See State v. Kohl*, 2000 UT 35, ¶22, 999 P.2d 7 (quoting *State v. Longshaw*, 961 P.2d 925, 928 (Utah Ct. App. 1998). The State knew that the police had requested that Mr. Allen take a polygraph examination.[10] Rather than take precautions to prevent the "lie detector" reference, the State allowed and arguably elicited the lie

[10]The prosecutor, in the course of preparing for Joey Wright's testimony at trial, met with him on more than six occasions (R. 2053:659:2-5). Consequently, the prosecutor had a good understanding of Wright's testimony and presumably the answer elicited (R. 2053:659-60).

detector reference, which, in turn, allowed the jury to abdicate its all-important and difficult truth finding function.[11]

V. THE TRIAL COURT MISINTERPRETED THE LAW AND ERRONEOUSLY APPLIED THE WRONG STANDARD IN THE COURSE OF DENYING THE MOTION FOR A NEW TRIAL BASED ON JUROR MISCONDUCT.

In its Brief, the State argues that the trial court correctly denied the motion for a new trial based upon juror misconduct because the juror contact was not with a "court participant". *See* Brief of Appellee, p. 59-61. The State's argument, however, fails to take into account crucial distinguishing facts and circumstances.

Contrary to the State's assertion, the legal standard to be applied in the instant case is set forth in *State v. Pike*, 712 P.2d 277 (Utah 1985), in which this Court articulated the following rule:

> a rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors which goes beyond a mere incidental, unintended, brief contact . . . . [W]hen the contact is more than incidental, the burden is on the prosecution to prove that the unauthorized contact did not influence the juror.

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[11]The State's claims concerning inadequate briefing are without merit in light of Utah case law and the applicable rule of appellate procedure. *See State v. Gamblin*, 2000 UT 44, ¶7, 1 P.3d 1108 and Utah Rule of Appellate Procedure 24(a)(9).

Id. at 280; *see also*, *Logan City v. Carlsen*, 799 P.2d 224, 225-26 (Utah Ct. App. 1990); *cf. State v. Martin*, 2002 UT 34, ¶45, 44 P.3d 805 (quoting *State v. James*, 819 P.2d 781, 793 (Utah 1991) (citations omitted)). For all intents and purposes, the contact that served as the basis for the motion for a new trial occurred between the juror and Ms. Camille Mauerhan. Although press reports and spouses were the mediums through which the information traveled, the contact substantially amounted to improper contact between the juror, a witness, and counsel. Consequently, this case does not present the innocuous contact between a juror and an outsider as the State would have this Court believe. The contact involved testimony and assertions of interested parties.

This distinction is particularly important in the instant case because first, jury taint is nearly impossible to prove or, in other words, "improper contacts may influence a juror in ways he or she may not even be able to recognize." *See State v. Anderson*, 65 Utah 415, 237 P. 941, 943 (1925); *State v. Velasquez*, 672 P.2d 1254, 1263 (Utah 1983). Second, there exists a need in judicial proceedings such as the instant case to avoid the appearance of impropriety. *See State v. Durand*, 569 P.2d 1107,

1109 (Utah 1977); *Glazier v. Cram*, 71 Utah 465, 267 P. 188, 190 (1928).[12]

CONCLUSION

Based on the foregoing, Mr. Allen respectfully asks that this Court reverse his conviction and remand the case to the district court together with any necessary instructions deemed appropriate. Mr. Allen further requests that this Court grant him any further relief the Court deems just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 22 day of October, 2004.

ARNOLD & WIGGINS, P.C.

Scott L Wiggins
Attorneys for Defendant

[12]The State did not address the cumulative error argument set forth on pages 41 through 42 of the Brief of Appellant. Contrary to the State's assertion, this case is particularly appropriate for consideration under the cumulative error doctrine.

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 25 day of October, 2004:

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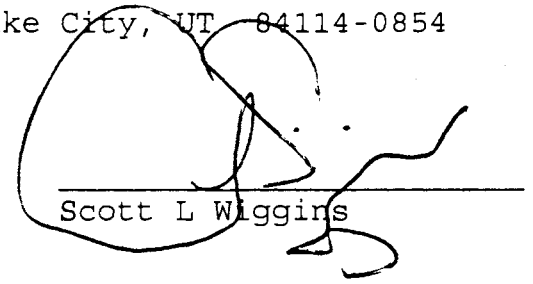

Scott L Wiggins

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 22 day of October, 2004:

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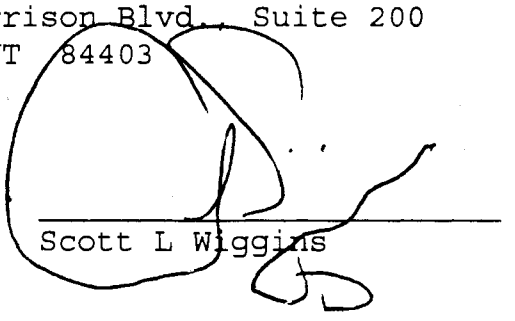

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ADDENDA

Addendum A: Kenneth S. Bordens and Irwin A. Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law and Hum. Behav. 339 (1985)

Addendum B: Sarah Tanford, Steven Penrod, and Rebecca Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Hum. Behav. 319 (1985)

Tab A

Law and Human Behavior, Vol. 9, No. 4, 1985

Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*

Kenneth S. Bordens† and Irwin A. Horowitz‡

Criminal courts routinely allow a defendant to be tried for multiple charges in a single trial. The practice is known as joinder of offenses. The issue of joinder of offenses is examined from a legal and psychological perspective. Relevant court decisions and their implications are discussed. In addition, the recent research conducted by social scientists concerning the possible reasons for the prejudicial effects of joinder of offenses is critically reviewed. Suggestions are offered, based upon previous joinder research, for the direction of future research into the loci of the effect and into potential remedies.

INTRODUCTION

A number of recent studies of legal issues by social psychologists have demonstrated that joining of criminal offenses results in a bias against the defendant. Specifically, the research indicates that the defendant is more likely to be found guilty in a joined trial as compared to separate trials on each offense (Horowitz, Bordens, & Feldman, 1980; Tanford & Penrod, 1982; Bordens & Horowitz, 1983; Tanford, 1983).

There are two competing interests at play relating to joinder of offenses: Saving the time and the expense involved in separate trials, and the interest of the defendant in obtaining a fair, unbiased trial. Because of the conflicting interests, compromises must be reached. Most often these compromises favor judicial efficiency. The impact of joinder of offenses is mitigated by the fact that concurrent sentences are often meted out for any multiple convictions. Presumably, the

* This paper is an elaboration of one presented at the annual meeting of the Academy of Criminal Justice Sciences, Chicago, March 1984.

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court's interests are served by saving time and expense and the defendant's by meting out the concurrent sentences.

The interest expressed by both the courts and social scientists suggests that the issue of joinder of offenses is of great importance on a thoretical and practical level. This paper has three objectives: (1) to review and evaluate the legal rules underlying the joinder of criminal offenses; (2) to review and critically analyze the psychological literature, both theoretical and empirical, relating to the "joinder effect"; and (3) to suggest the direction for future joinder research with respect of both the locus of the effect and possible remedies.

Joinder of Offenses: Legal Background

Rule 8 of the Federal Rules of Criminal Procedure specifies the requirements for joinder of offenses or defendants in the same indictment or information (Georgetown, 1983). Under Rule 8(a) of the Federal Rules of Criminal Procedure, the prosecution may join multiple offenses if they are of the same or similar character, are based upon the same transaction, or are based upon the same transactions constituting part of a common pattern of behavior. It should be noted that many state statutes concerning joinder are patterned after the federal rule.

The rule allowing for joinder of offenses seems to have evolved from a concern over judicial economy. Rule 8 appears to balance the prejudice inherent in joined trials against the benefits of judicial economy. However, the dominant theme of the rule is the issue of judicial economy. By combining several charges into a single proceeding the court saves the time and expense of seating several juries and tying up valuable court time (Harder, 1982). In practice, the beneficiary of the joinder rules is the prosecution. Not only can the prosecution economize by preparing only one trial, but may also benefit by the possibility of obtaining more convictions. In any event, the defendant's rights appear to be subordinate to judicial economy.

An alternative view of the evolution of joinder rules is provided by Nowak and Key (1982). According to Nowak and Key, joining of criminal offenses served the purpose of protecting the defendant against being charged serially on a number of related offenses. In response to concerns over multiple convictions several state legislatures have enacted statutes prohibiting multiple convictions or consecutive sentences for a single criminal episode (Nowak and Key, 1982).

Improper Joinder and Severance

Generally speaking, the trial judge has wide discretion when joinder issues are considered. The defense may make a pretrial motion to have charges separated (severance). The law does provide for severance of offenses when joinder would be inherently prejudicial (Georgetown, 1983).

Rule 14 of the Federal Rules of Criminal Procedure provides that if either the defendant or the government is prejudiced by joinder the trial court may grant a motion to sever the offenses. In considering a pretrial motion to sever the trial judge must weigh the competing interests of possible prejudice to the defendant

and the public interest in avoiding possibly redundant separate trials (Georgetown, 1983).

The courts are cognizant of the possible prejudicial effects of joinder but feel that equity is restored by meting out concurrent sentences for convictions arising out of joined offenses. The court has also found some consolation in the fact that a judicial instruction is delivered to jurors to keep joined charges separate and arrive at independent verdicts. Consequently, the court often tips the scales in the favor of the prosecution and denies a pretrial motion to sever offenses.

If the trial judge denies a motion to sever and conviction occurs, the defendant has the right to appeal on the basis of misjoinder. In the appeal the burden of proof is on the defendant to show that joinder of offenses led to actual prejudice. In practice, the Appellate Court presumes that joinder was proper unless the defendant demonstrates that the joinder was based upon bad faith on the part of the prosecution or that the law was misinterpreted (United States v. Marzalkowski, 1982). All possible prejudicial risks, including the possibility of evidentiary spillover from one charge to the other(s) or the implication of a criminal personality, are weighed against judicial economy.

Interestingly, Appellate Courts require that the defendant demonstrate that the trial judge abused his discretionary powers when joinder was allowed. It is not sufficient that the defendant show that conviction would have been much less likely had the charges been severed (United States v. Thomas, 1982). Generally, if the evidence presented at the joined trial would have been admissible in the severed cases misjoinder is treated as "harmless error" (Georgetown, 1983).

The discretionary powers given to the trial courts are rarely challenged by appellate courts. In practice reversals of convictions for failure to grant severance are rare (Loh, 1984). Indeed, reversal seems to require not only "inherent prejudice" but egregious prejudice. For example, in People v. Shapiro (1980), the appellate court held that joining the first indictment (64 counts of homosexual sodomitic acts) with two others (promoting prostitution and other sexual offenses) made conviction more likely based upon the assumption of criminal propensity (Loh, 1984). In this rare case the Appellate Court held that joining the first indictment with the other two raised the probability of improper conviction.

Clearly, the defendant is at a disadvantage when the issue of joinder of offenses arises. Trial courts are hesitant to grant motions to sever and Appellate Courts rarely challenge the decision made at the trial court level. Only in those cases where joinder leads to obvious and flagrant prejudice will the courts grant a motion to sever offenses or an appeal based on misjoinder.

The Court's Concern Over Joinder

In Drew v. United States (1964) the court noted that the defendant could be prejudiced in several ways: the defendant may be confounded in presenting separate defenses, the jury might utilize evidence of one crime to infer a criminal disposition, or the jury might cumulate the evidence of the various crimes charged.

The leading case on joinder is U.S. v. Foutz (1976). The court mirrored the concerns expressed in the Drew decision by specifying the same sources of possible prejudice. In Foutz, the court went a step further in its reasoning and considered the possible impact and confounding of the evidentiary strength of each charge. In discussing the facts in Foutz, the court suggested that the jury likely had found the defendant guilty on the second, strong charge, and then inferred that as Foutz had commited robbery once, it was likely that he committed a robbery a second time. The result was that Foutz was convicted of both the strong second charge and the weaker first charge (Tanford, 1983).

One method, as noted above, that the court system has used to eliminate the problem of joinder is to admonish the jury, through an instruction of law, to keep the evidence from each charge separate and reach independent verdicts. The Foutz court was not impressed with the efficacy of these instructions. The judges did not think that the standard juridic instructions were sufficient to eliminate the inherent prejudice arising from joinder. The instructions did not, in the court's view, exclude the possibility of intercharge confusion of evidence (Tanford, 1983). The court felt, at least in the Foutz case, that joinder was a prosecutorial convenience yielding increased convictions.

Baron (1977) strongly recommends that multiple offenses only be joined if they arise out of a single criminal episode. However, "single criminal episode" appears to be an elusive concept. Courts have the discretion of defining a single criminal episode by focusing on the defendant's animus, or upon the interval between various criminal acts (Nowak and Key, 1982).

Despite the concern expressed by Baron and the Appellate courts, the practice of joinder is widespread. The courts have not provided a concrete solution to the problems inherent in joining offenses. Perhaps empirical data generated from research will help the courts adequately deal with the problem. The lack of precision in the state statutes along with various court rulings have, in essence, given courts plenary discretion in determining joinder.

Clearly, there are definitional and discretionary issues to be addressed by the legislatures. The role that behavioral scientists may play in this process is to offer crystalized advice to jurists as to (1) the prejudicial effects of joinder, (2) the psychological loci of the joinder effect, and (3) empirically based remedies for those circumstances in which the prejudicial effects of joinder are clear.

It should be noted that while this paper is concerned with the effects of criminal joinder, parallel problems exist within civil law. Class action suits combine various cases into one proceeding. Federal rule 42 specifies the parameters of the consolidation of civil cases. Again, in this instance, courts, special masters, and settlement judges are given what amounts to plenary powers. While civil joinder has special concerns and parameters of its own, the joinder effect should not be seen as limited to criminal cases.

The remainder of this paper will be devoted to reviewing the current psychological literature relating to the joinder effect. Whether the effect can be demonstrated empirically, the locus of the effect and possible solutions based on the research are issues that will be discussed in separate sections below.

Joinder Research

Two of the earliest research investigations of the joinder phenomenon were conducted by Kerr and Sawyers (1979) and Horowitz, Bordens, and Feldman (1980). Both studies clearly show that the practice of joining offenses leads to a bias against the defendant. Kerr and Sawyers (1979) had introductory psychology students read a brief summary of a criminal trial in which a defendant was charged with two offenses (robbery and receiving stolen property). Kerr and Sawyers varied the strength of the evidence on each charge (evidence either strongly or weakly linked the defendant with either crime), and the order in which the cases were *judged* by the subjects (the order in which the cases were presented was held constant). Kerr and Sawyers found that when the robbery case was adjudicated first its strength significantly affected the manner in which the receiving stolen property case was judged. When the robbery case was strong the probability of conviction on the receiving stolen property case was lower than if the robbery case was weak. Horowitz, Bordens, and Feldman (1980) had simulated jurors listen to an audiotaped summary of either joined or severed rape cases. In this study the strength of the evidence of the cases to be judged (clear for the prosecution or close) was varied along with the joined/severed trial mode. Horowitz et al. obtained a joinder effect for those cases presented in the first ordinal position in the joined trials. Comparisons between the first cases from joined trials with their severed counterparts showed that a defendant was rated as more guilty in the joined than severed trials. The joinder effect held regardless of the strength of the first or second cases. No effect of joinder was found for cases in the second position.

The Kerr and Sawyers (1979) and Horowitz et al. (1980) studies demonstrated that the concern expressed by the court in the U.S. v. Foutz are well founded. In fact, joining criminal offenses into a single trial proceeding leads to an increased chance that the defendant will be convicted on at least one of the charges.

Several recent studies have empirically verified the prejudicial effect of joinder or criminal offenses (Tanford & Penrod, 1982; Bordens & Horowitz, 1983; Greene & Loftus, 1983; Tanford, 1983). There exists a substantial body of research demonstrating that a defendant is at a disadvantage when joinder of offenses is allowed. It should be noted that the research on joinder has included studies using a variety of subject types (actual jurors vs. students), methods (deliberation vs. no deliberation), trial presentation modes (written, audiotaped, videotaped), and measures (continuous vs. dichotomous). For example, Tanford (1983) found that student jurors did not differ significantly from actual jurors and that jury deliberation did not significantly affect the joinder phenomenon. The various modes of presenting joined cases increases the confidence in the generalizability of the joinder effect. The data for the most part confirm the court's reservations about the practice of joining criminal offenses that was expressed in the U.S. v. Foutz. The questions that still need to be examined are those that were brought up by the court regarding the mechanisms that underlie the biasing effect of joinder of offenses.

Loci of Prejudice in the Joinder Effect

In U.S. v. Foutz (1976) the court speculated as to the possible sources of prejudice due to improper joinder of offenses. The Foutz decision specified four sources of potential prejudice:

1. Confusion of evidence may occur since the jurors are hearing evidence surrounding more than one offense.
2. Evidence may accumulate across multiple charges.
3. A defendant may be confounded in his attempt to mount a defense to the multiple charges (e.g., if the defendant wishes to take the stand for one charge but not another).
4. Because jurors are hearing evidence relating to more than one offense the jurors may be led to an inference that the defendant has a criminal disposition.

In the following sections of the paper we will explore the research evidence relating to three of these issues.

Confusion of Evidence

The court's notion of confusion of evidence raises questions about the ability of jurors to keep the evidence from each multiple charge separate in memory. The court's concern about intercase confusion of evidence relates to a classic problem in psychology. The task facing a juror judging a joined trial is similar to the one facing a subject in a memory experiment who is required to learn two lists of words simultaneously and then recall items from one of the lists. The juror adjudicating a joined trial must "learn" evidence from each charge and later recall the evidence from each charge separately. In both instances there exists the possibility that interlist (intercase) confusion will occur.

The theory of memory that best applies to the joinded trial situation is interference theory. According to interference theory when a person learns material from two sources simultaneously intersource interference is likely to occur during recall. This interference would be manifested by having items of information from source 1 recalled as part of the recall of source 2 (and vice versa). Further, according to the list differentiation hypothesis (Underwood, cited in Hulse, Deese & Egeth, 1975), the more similar the information from the two sources the greater will be the intersource confusion.

A similar process may operate when jurors must judge evidence from joined cases. Since the court will only allow joinder if the crimes are of the same or similar nature there may be a high degree of intercase evidentiary confusion. In joined trials where evidence is drawn from the same conceptual categories (for example, where both crimes are murders and the evidence from one may be similar to the evidence from a second) the jurors may not be able to keep the evidence from each charge separated in memory.

Researchers interested in the joinder effect have investigated the role of memorial processes. For example, Tanford and Penrod (1982) had subjects recall evidence from each case in a joined trial. Tanford and Penrod found that there were intrusions from case to case on the measures of memory. They also found

that the percentage of intrusions (items of evidence from one charge that were incorrectly remembered as evidence from another charge) against the defendant (antidefendant intrusions) was affected by the number of cases included in the joined trial. There were also intrusions in favor of the defendant (prodefendant intrusions) when cases were joined for trial.

Similarly, Bordens and Horowitz (1983) found that joinder of offenses leads to intercase confusion of evidence. In their study, Bordens and Horowitz manipulated the strength of the cases judged (clear or close) as well as the similarity of the joined charges (rape–rape or rape–murder). Consistent with interference theory Bordens and Horowitz found that more confusion of evidence occurs when the joined charges are similar as opposed to dissimilar. The effect of case similarity must be qualified since there was a significant charge similarity by strength of second case interaction. When the charges were the same the rate of antidefendant intrusions was high regardless of the strength of the evidence for the second charge. However, when the charges were dissimilar the rate of intrusions was still high if the second case was clear for the prosecution (but not if it was close). Confusion of evidence may occur even when the cases joined are not highly similar.

It should be noted that not all of the joinder research has uncovered confusion of evidence. Greene and Loftus (1983), using a recognition memory task, found no significant confusion of evidence in their study. The lack of confusion of evidence in the Greene and Loftus study might stem from the fact that subjects read a brief summary of a case and then were administered a recognition task to remember evidence. The relative paucity of evidence may have made the cases easy to keep separated. Combined with the use of a sensitive measure of memory, the relatively unrealistic simulation may have been insensitive to confusion effects.

The results from the Tanford and Penrod (1982) and Bordens and Horowitz (1983) studies largely confirm the fear expressed by the Foutz court concerning confusion of evidence. However, a critical issue still needs to be explored: Does memory confusion influence the jurors' verdict?

Tanford and Penrod (1982) investigated the relationship between the degree of evidence confusion (evaluated with an evidence recognition task) and guilt judgments (a dichotomous guilty/not guilty measure) by correlating a difference score of the pro- and antidefendant intrusions with final verdicts. The correlations reported were small and nonsignificant. However, they were in the direction expected if confusion of evidence is related to verdicts. Similarly, Tanford (1983), Tanford and Penrod (1984), and Tanford, Penrod, and Collins (1985) also report low correlations between their measures of confusion and verdicts. Based upon their research Tanford and her associates have concluded that confusion of evidence plays a minimal role in the joinder effect. In contrast, Bordens and Horowitz (1983), using a free recall memory task and a continuous measure of guilt judgment, found a significant moderate correlation between the transformed (arcsin) percentage of antidefendant intrusions and guilt judgments. Their results suggest that as the percentage of antidefendant intrusions increases so does the perceived guilt of the defendant.

The results of the series of studies reported by Tanford and her associates and those reported by Bordens and Horowitz (1983) are in conflict. The conflict between the Tanford studies and the Bordens and Horowitz may stem from at least two sources: Different measures of memory and different dependent variables.

In the studies reported by Tanford and Penrod (1983) and Tanford, Penrod, and Collins (1985) the measure of memory employed was a recognition task. In contrast, Bordens and Horowitz (1983) used a free recall task. A juror may be better able to recognize an item of evidence as not belonging to a particular case than if the juror was required to freely recall evidence. The net effect would be that few intrusions would result. In fact, Tanford (1983) reported that the frequency of intrusions was low and that there was little variability. The low variability in the memory measure may have contributed to an underestimation of the relationship between memory and verdicts (Roscoe, 1974). Where Tanford and her associates have used a free recall task to evaluate the impact of evidence confusion they have calculated difference score (prodefendant–antidefendant intrusions) that was then correlated with verdicts. This method also showed little or no correlation between evidentiary confusion and verdicts. However, the use of the difference score may have led to an underestimation of the correlation. It may be that such a difference score is unrelated to the raw percentages of antidefendant intrusions.

Additionally, all of the Tanford studies have used the dichotomous guilty/not guilty verdict measure when attempting to correlate variables (e.g., memory) with guilt judgments (Bordens and Horowitz used a continuous measure of guilt). While the dichotomous measure does have high ecological validity the correlation calculated between a continuous measure and dichotomous measure tends to be conservative and to underestimate the degree of relationship between variables (Stenner, 1969). Combined with the use of a recognition task or a difference score the methods used by the Tanford studies may underestimate the degree of relationship between memory and guilt judgments.

It is interesting to note that in the research reported above there were very few intrusions from one case to another in joined trials. This raises an interesting question about a second aspect of evidentiary confusion. In all of the relevant joinder research the problem of intrusions was approached from a quantitative perspective (the number or percentage of intrusions). No study has directly addressed the qualitative nature of the intrusions. That is, were the intrusions observed of high or low probative value? One could certainly envision a situation in which a single piece of evidence from one case intrudes on the memory of a second and has a great effect on guilt judgments (e.g., a fingerprint on a gun). Future research might address not only the issue of the quantity of the intrusions but also the quality.

In summary, the available evidence lends support to the notion that jurors may confuse the evidence from multiple charges in joined trials. However, the research is equivocal on whether there is a strong relationship between measures of confusion (intrusions) and guilt assessments. Owing to the methodological differences between the major joinder studies it is not possible to clearly deter-

mine what, if any, role evidentiary confusion plays in the joinder effect. Research using ecologically valid measures of memory should be conducted to disentangle the contradictory results that now exist.

Accumulation of Evidence

In the Foutz decision the court also expressed the concern that evidence might accumulate across cases in a joined trial. In essence the court was concerned that the evidence from one case may serve to reinforce the evidence in another. The concern is that a given piece (or pieces) of evidence within a particular case will be seen as strong if the case is placed within the context of a joined trial rather than tried alone.

Tanford (1983) has found that joinder of offenses influenced subjects' ratings of both prosecution and defense evidence. Juror-subjects were asked to rate the evidence presented by the prosecution and defense on nine-point scales (1 = strongly indicates innocence, 9 = strongly indicates guilt). Comparisons were made between joined and severed versions of the cases. Tanford found that the ratings of the prosecution evidence were higher in the joined than severed cases. Also, the defense evidence was rated lower in the joined than severed cases. Tanford's data then are consistent with the notion that jurors use evidence from one case to reinforce the evidence from a second, thus accumulating the evidence across cases.

Research reported by Bordens and Horowitz (1983) does not support the data provided by Tanford (1983). Bordens and Horowitz asked subjects to write down their "thoughts" about the case(s) heard. Those subjects were also asked to rate the degree to which those thoughts favored either the prosecution or defense. It might be predicted that if accumulation of evidence is taking place across cases in a joined trial that the ratings of the cognitions associated with the prosecution's case would be more favorable towards the prosecution in the joined than severed cases. The results showed that joinder of offenses did not significantly affect the ratings of the antidefendant cognitions. Hence, these data do not lend support to the notion that jurors accumulate evidence across cases in a joined trial.

It is not possible to state clearly whether or not accumulation does occur based upon these two studies. Both studies were carefully designed and executed. However, certain differences were evident in the nature of the samples used in the studies and the methodology. For example, Bordens and Horowitz had subjects rate their own thoughts about the cases and Tanford had subjects rate the overall strength of the prosecution and defensive evidence as well as preselected items of evidence. Since Bordens and Horowitz did not have subjects directly assess the strength of evidence their data may not be a true test of accumulation of evidence over joined trials. Additionally, the data reported by Tanford (1983) and Bordens and Horowitz (1983) are not as disparate as they seem. Tanford reported changes in the ratings of evidence as a function of joinder that were significant but small in magnitude. Hence, if joinder does affect ratings of evidence its impact is small. Clearly, more research is indicated to help clarify the

role of accumulation of evidence in joined trials. However, given the null findings reported by Bordens and Horowitz and the small effect reported by Tanford research into accumulation may prove to be less fruitful than research into other causes for the joinder effect.

Inferences About the Character of The Defendant

In the U.S. vs. Foutz the court also expressed a concern that in joined trials the jury would infer that the defendant has a criminal disposition based upon the knowledge of the multiple charges. The court has expressed the concern that the jury would develop a systematic bias against the defendant because of the multiple charges. The mere knowledge of multiple charges may establish a perception of consistency of behavior, thus making it easier to attribute the crimes to the defendant.

Two recent studies addressed the problem of jurors drawing an inference that the defendant has a criminal personality (Tanford, 1983; Greene & Loftus, 1983). Each of these studies shows that jurors do, in fact, infer that the defendant has a criminal disposition when cases are joined as opposed to severed.

Greene and Loftus (1983) had juror-subjects rate a defendant tried for multiple offenses on three dimensions: dangerousness, likeableness, and believability. Greene and Loftus found that when a defendant was tried for multiple offense in a single trial he was seen as more dangerous, less likeable, and less believable than a defendant tried on separate offenses. Hence, the jurors were likely to form a different opinion of the defendant's character based upon the nature of the trial (joined vs. severed).

Tanford (1983) also investigated the impact of joinder on inferences about the defendant. Tanford had juror-subjects rate the defendant on 11 separate nine-point rating scales representing different trait and behavioral dimensions (e.g., honest–dishonest, dangerous–not dangerous, future crime likely–future crime not likely, typical criminal–not typical criminal). A factor analysis revealed two major dimensions: criminality–credibility and a global evaluation factor. Tanford analyzed these data by calculating factor scores for the two dimensions and looking at how each was affected by joinder. It was found that subjects tended to rate the defendant less favorably on the criminality–credibility and global evaluation dimensions in the joined than severed trials. These data, according to Tanford, "offer strong support for the prediction that joinder leads to negative inferences about the defendant" (p. 44). Based upon the results of a path analysis, Tanford concluded that the negative inferences generated about the defendant as a result of joinder serve as a "criminal schema" that influences later judgments of the evidence. The implication of Tanford's data is that the criminal schema is activated relatively early in the judgment process and serves to influence how evidence is perceived later in the judgment process.

Tanford's (1983) results, while intriguing, may not present an accurate picture of the causal relationship between inferences of criminality and guilt judgments. Tanford's study was not designed to experimentally test the causal relationship between the formation of a "criminal schema" and guilt verdicts. Instead, a

correlational path analytic approach in which ratings of the defendant's character were obtained after verdicts were assigned was used. The dangers of using path analysis to infer causality in situations similar to Tanford's study have been discussed by Spaeth (1975) and Kim and Kohout (1975). The temporal ordering of judgments concerning the defendant and guilt cannot be clearly established from Tanford's data. Tanford favors the idea that the "criminal schema" is formed early which causes changes in how the evidence is perceived and the subsequent judgment of guilt. However, it could as easily be argued that after assigning guilt the subjects reasoned that the defendant had a criminal personality and reevaluated the evidence. Tanford does acknowledge the limitations of using the path analysis and does use existing research on impression formation to support her causal model. Such a strategy certainly provides an interesting base on which future experimental tests of the criminal schema model could be built.

Additionally, there is little direct evidence on when the "criminal schema" is activated. However, data reported by Tanford and Penrod (1982) suggest that the schema is not activated until relatively late in the trial. Tanford and Penrod had subjects provide a prior probability of the defendant's guilt based only on knowledge of the nature of the charge(s). Tanford and Penrod found that joinder of offenses did not significantly affect subjects' estimates that the defendant committed the crime(s). If, as Tanford (1983) suggests, the criminal schema is a key (if only indirect) mediator of the joinder effect (rather than a by-product of it) it might be expected that its impact would be seen as soon as the juror learns that the defendant has been charged with multiple offenses and before any evidence is presented.

Tanford's results, along with the results reported by Greene and Loftus, provide an interesting starting point for further investigation of the problem of the effects of criminal inferences about the defendant on guilt judgments. There is enough social psychological theory and research (e.g., attribution theory) to suggest a relationship between inferences about the defendant and guilt judgments. However, neither study clearly and unambiguously establishes a causal link between such inferences of criminality and guilt judgments. Experiments could easily be constructed that would directly test the impact of joinder on inferences of criminality. For example, a study could be conducted in which guilt ratings are obtained at various points in a joined trial (e.g., after finding out about the multiple charges, after presenting the evidence from the first case, etc.). Such research could address the issue of where in the judgment process the "criminal schema" is developed and how it might affect the perception of the evidence.

SUMMARY

The empirical research has shown clearly that the practice of joinder of offenses is prejudicial towards the defendant (although the magnitude of the joinder effect is often small). Defendants are more likely to be convicted on a given charge when that charge is tried within the context of a joined rather than

severed trial. Tanford, Penrod, and Collins (1985) have statistically combined the results of seven experimental studies on joinder. Following Rosenthal (1978) they computed an overall joinder effect for these studies and found a highly significant result. The pattern across these studies indicates a very robust effect of joinder of offenses. The research therefore demonstrates that the concerns of the court expressed in the U.S. vs. Foutz are well founded. In general there is evidence to show that jurors do confuse and accumulate evidence and do draw criminal personality inferences in joined trials.

Still unclear is the exact model that describes the underlying mechanisms that cause the joinder effect. The research reported by Bordens and Horowitz (1983) favors a cognitive processing approach focusing on the manner in which evidence is stored, manipulated and retrieved from memory. On the other hand the research reported by Tanford and Penrod (1982) and Tanford (1983) favors a more social psychological approach stressing the role of criminal inferences drawn about the defendant and how they relate to judgments of guilt.

At this point in time, given the conflicting nature of the research evidence, it is not possible to offer any concrete ideas on which of the court's concerns over joinder is most valid. Each of the three sources of prejudice discussed above has a firm base in psychological theory and research. Clearly more research centering upon the issues discussed above is needed before we can state conclusively what the loci of the joinder effect might be.

Directions for Future Research on Joinder of Offenses

Whatever the mechanism underlying the joinder effect, it is clear that the effect of joining multiple offenses in a single trial is a robust one and does increase the likelihood of a defendant being found guilty. We feel confident that the joinder effect is a valid reflection of the true state of affairs. The effect has been shown in a variety of studies employing different techniques and subject populations. Furthermore, while decision making is clearly dependent upon the context in which it occurs, the simulated trial contexts and the requirements of human decision making in the laboratory studies represent a reasonable approximation of juror decision making in a courtroom setting.

As social scientists we would like to be able to offer the courts concrete advice on how to attenuate the impact of joinder of offenses. Unfortunately, the state of the research at the present time does not allow such advice. If, for example, inferences of criminality mediate the joinder effect then all multiple offense trials would be prejudicial to the defendant. This would be especially true of those trials in which many charges are joined. On the other hand, if the major factor contributing to the effect is confusion of evidence then a case management approach (discussed briefly below) would seem to be the way to reduce the prejudicial effects of joinder. Before any conclusions about possible remedies can be made we need to isolate the loci of the joinder effect more clearly than is currently the case.

Once the loci of the joinder effect have been identified further research could focus on potential remedies to the prejudicial effect of joining multiple offenses.

Research could focus on several areas: pretrial case management (including using a bifurcated trial system), juror instructions and juror education.

There is a precedent, found in civil law, for considering the possibility of creative pretrial case management. Complex, multitort cases have necessitated innovative techniques to bring the issues before the bar. One such technique involves the use of multiple and separate juries. Juries are impanneled in a mass voir dire, hear common core issues, and then each jury is assigned to hear the presentations of a few of the plaintiffs (Rosenberg, 1984). A similar procedure could be used in the criminal arena. Multiple juries could be impanneled to hear multiple cases. Multiple juries have, in fact, been used in very lengthy criminal cases in lieu of granting a motion for severance. In addition, the Eleventh Circuit Court in United States v. Hayes (1982) upheld a trial court's decision to impannel multiple juries, each assigned to one of the defendants who were tried together. The Circuit Court held that the dual jury guaranteed a fair trial while preserving judicial economy. It may be that trial courts would find such multiple jury trials to be permissible when the evidence is complicated or highly similar across multiple offenses. The duplication of trials would be avoided while the defendant's rights would be protected.

In the area of judicial instructions, most of the existing research suggests that limiting instructions have little effect on the joinder effect (e.g., Tanford and Penrod, 1982). However, Tanford, Penrod, and Collins (1985) have reported that a carefully designed set of instructions may have an effect on joinder of offenses under certain conditions. Future research could systematically focus on the parameters of judicial instructions that would make them more effective in reducing juror bias. If such instructions could be constructed they may reduce joinder-related bias regardless of the locus of the effect.

Finally, in the area of pretrial juror education, research could focus on the effectiveness of making the jurors aware of the importance of following judicial instructions to keep the evidence from multiple charges separate and reach independent verdicts. Such an education could be made part of already existing procedures (e.g., films, mild lectures concerning the role of the jury, etc.) used to socialize jurors into the legal system. Such a remedy would be predicated on the idea that forewarning jurors about the potential bias inherent in joinder would help to eliminate the bias.

CONCLUSION

It is clear that research is needed in two areas: Further research on the loci of the joinder effect is needed to resolve some of the conflicts in the present literature. It is only after we understand the locus of the effect that we can begin to offer the court concrete, crystalized advice on remedies. Also, research is required to test the implications of various remedial steps. Major research questions should center around the impact of implementing the remedies and which remedies are the most efficient (in terms of both judicial conservation and safe-

guarding the rights of the defendant). Additionally, we would also be interested in knowing if the proposed remedies create a host of new, previously nonexistent, sources of bias. Ideally, a remedy should eliminate the joinder effect while not creating any new problems for the judicial system.

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Tab B

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Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*

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The present research investigated decision-making processes in "joined" trials of multiple offenses. Subjects judged videotaped trials of three joined charges in a factorial design that varied charge similarity, evidence similarity, and judges' instructions designed to reduce judgment biases; or judged one of several charges presented individually. The results indicated that subjects were more likely to convict a defendant in a joined trial than on the same charge tried by itself, particularly when the charge was presented in the third position. Convictions were more frequent when joined charges were similar, and judges' instructions significantly reduced conviction rates. Subjects judging joined trials confused evidence among charges, rated the prosecution's evidence as stronger, and rated the defendent less favorably than subjects judging single trials. The findings were compared statistically to the results of previous research, and it was concluded that increased convictions in joined trials are robust effects.

INTRODUCTION

> *Federal Rules of Criminal Procedure, Rule 8(a). Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies, or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting part of a common scheme or plan.
>
> *Federal Rules of Criminal Procedure, Rule 14. Relief from Prejudicial Joinder.* If it

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> appears that a defendant or the government is prejudiced by joinder of offenses . . . in an indictment or information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance . . . or provide whatever other relief justice requires.

The issue of "joinder of offenses" poses a problem for the courts, since joining multiple charges as provided by FRCP Rule 8(a) may result in prejudice to a defendant contemplated by Rule 14. Until recently, the bulk of our knowledge about the nature of this prejudice came from a body of appellate court opinions in which judges relied on "armchair psychology" to decide whether joinder was or was not prejudicial in a particular case. Traditionally the courts have recognized three potential sources of prejudice to a defendant in a joined trial: (1) confusion of evidence among charges, (2) accumulation of evidence across charges and (3) juror inferences about the defendant's "criminal disposition" (United States v. Foutz, 1976).

Recently, however, psychological researchers have investigated the joinder issue experimentally using written or audiotaped trial summaries. Bordens and Horowitz (1983), Green and Loftus (1985), Horowitz, Bordens, and Feldman (1980), and Kerr and Sawyers (1979) all found that a defendant was more likely to be convicted on a particular charge in a joined trial than on the same charge tried alone, although Bordens and Horowitz (1983) and Horowitz et al. (1980) found that this effect occurred primarily for charges presented in the first rather than the second position. Tanford and Penrod (1982) used trials containing a single charge or two, three, or four joined offenses, and found that the probability of conviction on a particular charge increased as a function of the number of charges with which it was joined.

Empirical research on joinder also provides evidence pertaining to each of the three legal theories of prejudice: confusion, accumulation, and criminal inference. Bordens and Horowitz (1983) and Tanford and Penrod (1982) both found that joinder led to recall intrusions of facts from one charge to another, supporting the theory of confusion of evidence. However, Bordens and Horowitz found that confusion was related to guilt judgments, whereas Tanford and Penrod found that it was not. Tanford and Penrod found that subjects judging joined trials rated the evidence as more incriminating than subjects judging a single trial, supporting an accumulation of evidence process, whereas Bordens and Horowitz found that ratings of thoughts generated against the defendant (a different measure of evidence strength) did not differ in joined and single conditions. However, both Bordens and Horowitz and Tanford and Penrod found that perceptions of evidence strength were strongly related to guilt judgments. Greene and Loftus (1985) and Tanford and Penrod (1982) found that joinder led to unfavorable ratings of the defendant's character, and that these ratings were strongly related to subjects' guilt judgments.

The legal remedy for prejudicial joinder is an instruction given by the judge at the end of the trial designed to alleviate potential biases. Tanford and Penrod (1982) found that instructions to consider charges separately did not significantly reduce convictions in joined trials, but they used a rather weak and artificial instruction manipulation. Using a more realistic manipulation, Greene and Loftus

(1985) found that the standard multiple-offense cautionary instruction used in Washington State courts also failed to reduce conviction biases, regardless of whether the instruction came at the start or the end of the trial.

Tanford and Penrod (1984) addressed the applied and theoretical limitations of previous research on joinder in a study designed to (1) focus on the psychological mechanisms underlying joinder effects, (2) provide guidance to judges in their decisions about when to join charges, and (3) maximize external validity in order to enhance the study's applied significance. Previous studies used written (Greene & Loftus, 1985; Kerr & Sawyers, 1979; Tanford & Penrod, 1982) or audiotaped (Bordens & Horowitz, 1983; Horowitz et al., 1980) trial summaries as stimulus materials, whereas Tanford and Penrod (1984) used videotaped trial reenactments. All previous joinder research used undergraduate subjects, whereas Tanford and Penrod used adults previously summoned for jury duty, two-thirds of whom had actually served on one or more cases. Also unlike previous researchers, Tanford and Penrod (1984) included group deliberation in their procedures. Qualified jurors judged a realistic videotaped trial containing a particular "target" charge tried by itself or in a joined trial with two other offenses that varied as a function of (1) charge similarity, (2) evidence similarity and (3) judges instructions designed to alleviate joinder-induced biases. The instruction manipulation was stronger than the standard instruction employed by Greene and Loftus (1985), and contained elements corresponding to each of the three legal theories of prejudice.

The results indicated that (1) the probability of conviction on the target charge (which was the same in all conditions) was higher in a joined trial than on the same charge tried by itself, (2) convictions increased regardless of the similarity of the charges or the evidence in the joined charges, and (3) instructions had no effect on conviction rates. In terms of the hypothesized sources of prejudice, Tanford and Penrod found that joinder led to (a) confusion of evidence on a recognition task, (b) strengthened perceptions of prosecution evidence strength and weakened perceptions of defense evidence strength, and (c) less favorable impressions of the defendant on dimensions of criminality (as indexed by several ratings by credibility and criminal tendency) and global evaluations (measured by ratings of goodness, nervousness, dangerousness, and attractiveness). As in their previous research (Tanford & Penrod, 1982), Tanford and Penrod (1984) found that confusion was unrelated to verdicts, whereas defendant and evidence ratings were related to verdicts, as well as to each other.

Based on social cognition research (Fiske & Taylor, 1984; Higgins, Herman & Zanna, 1981; Nisbett & Ross, 1980), Tanford and Penrod (1984) proposed a single explanatory model to account for their findings, and tested the model with path analytic techniques. The results suggested that the three processes of confusion, accumulation, and criminal inference, as well as the inefficacy of judges' instructions, can be interpreted in terms of impression formation processes (Asch, 1946; Schneider, Hastorf & Ellsworth, 1979). Tanford and Penrod intepreted their results as indicating that joinder fosters a negative impression of the defendant that influences (1) memory for evidence (leading to confusion among charges); (2) perceptions of the evidence, which may be distorted in a

manner consistent with the impression (i.e., the prosecution evidence appears stronger, the defense evidence weaker); and (3) inferences about the causes of the defendant's behavior based on his criminal character. This process leads to an impression of greater guilt in a joined trial which is quite resistant to change, and therefore joinder increases conviction rates both with and without instructions (Tanford & Penrod, 1984).

Support for a similar idea in a related jury context was obtained by Pyszczynski, Greenberg, Mack, and Wrightsman (1981) and Pyszczynski and Wrightsman (1981). Pyszczynski et al. argued that attorneys' opening statements are crucial aspects of the trial, since they create thematic frameworks (Lingle & Ostrom, 1980) or schemata (Barlett, 1932; Taylor & Crocker, 1981), which affect the way in which subsequent trial evidence is evaluated. In two studies (Pyszczynski, Greenberg, Mack, and Wrightsman, 1981; Pyszczynski & Wrightsman, 1981), opening statements were manipulated to create predispositions towards guilt or innocence, and these predispositions had a strong effect on verdicts even when the evidence did not support the opening statement. Additional evidence for the importance of first impressions was obtained in a study by Kassin and Wrightsman (1979), in which judges' instructions on reasonable doubt affected verdicts when the instructions were presented at the start of the trial, but had no effect when presented at the end of the trial.

Research on the effect of prior convictions has psychological implications similar to those raised by the joinder issue. A number of studies have found that when evidence of a defendant's prior criminal record is introduced, subjects are more likely to convict the defendant (Doob & Kirshenbaum, 1973; Hans & Doob, 1976; Sealy & Cornish, 1973; Wissler & Saks, 1985). Legally, evidence of prior convictions is sometimes admissible when witness credibility is at issue, but jurors are not to use the information to decide guilt. However, in the above studies, limiting instructions to use the record information to judge credibility but not guilt were ineffective. Moveover, Wissler and Saks (1985) found that prior record did not affect credibility assessments, although it did influence guilt judgments. Prior convictions could operate psychologically in a manner similar to multiple charges, since both suggest that the defendant has been involved in other crimes. In either case, jurors may form an unfavorable impression of the defendant, which influences the way they process other trial information.

Conflicts in Existing Research

The joinder research reviewed above strongly indicates that joinder can influence judgments, but there are a number of inconsistencies among different studies. First, Bordens and Horowitz (1983) and Horowitz et al. (1980) found that joinder primarily increased convictions on the first, rather than the second, of two charges; whereas Greene and Loftus (1985), Kerr and Sawyers (1979), and Tanford and Penrod (1982) found that joinder increased convictions regardless of charge position. A potential explanation for this discrepancy is the strength of the cases used, although a direct comparison of case strength across studies is not possible since different researchers employed different measures of conviction rate. However, it appears that Bordens and Horowitz and Horowitz et al. used

stronger cases than those used by other researchers. The mean conviction rate obtained on *nonjoined* cases was 4.01 in the Bordens and Horowitz study and 4.0 in the Horowitz et al. study, measured on six-point scales where points 4, 5, and 6 represented degrees of guilt beyond a reasonable doubt (all three points were labeled guilty verdicts). Tanford and Penrod (1982) used much weaker cases, obtaining approximately 10% convictions across several nonjoined cases. Greene and Loftus obtained "conviction scores" ranging from 29% to 43% on severed cases. However, conviction was defined as ratings of 5, 6, and 7 on a 7-point scale, indicating that the defendant was either possibly (5), probably (6), or definitely (7) guilty, so these ratings are probably higher than would have been obtained if subjects were asked whether the defendant was guilty *beyond a reasonable doubt,* which is the standard of proof in a criminal trial. Thus it appears that Greene and Loftus also used relatively weak cases. Additional evidence that joinder effects are strong when cases are weak was obtained by Kerr and Sawyers (1979), who found that joinder increased convictions on a weak robbery charge (with a 25% conviction rate when it was not joined) but not a strong one (75% nonjoined convictions).

Greene and Loftus (1985) interpreted their finding of increased convictions on charges in either position as suggesting that the biasing effects of joinder occur at the time the verdict is reached. If the effect occurred instead during the processing of trial information, Greene and Loftus argue that a "spillover effect" of evidence from the first to the second joined charge should increase convictions on the second charge, relative to the first. However, Greene and Loftus also found that joinder led to negative impressions of the defendant, so their research lends itself equally well to an impression-based interpretation such as the one proposed by Tanford and Penrod (1984). If the impresson is formed at the outset of the trial, it should influence processing of information from both joined charges. The present research investigates this issue further by examining judgments on a number of different joined charges in the first, second, and third positions.

A second discrepancy between studies is the relationship between memory and verdicts. Tanford and Penrod (1982) obtained a nonsignificant positive correlation between free recall intrusions and verdicts (mean $r = .16$), and Tanford and Penrod (1984) obtained a zero correlation between recognition intrusions and verdicts. Bordens and Horowitz (1983) found that free recall intrusions against, but not in favor of, the defendant were significantly related to convictions (r values not provided). Research on memory–judgment relationships in other domains indicates that memory for specific items of information is not strongly related to overall impressions (Anderson & Hubert, 1963; Dreben, Fiske, & Hastie, 1979; Riskey, 1979). Bordens and Horowitz do not describe their recall task in detail, but it is possible that the task was structured in a manner conducive to recall of judgment-relevant information, particularly against the defendant (which should be more relevant to guilt determinations). However, the reasons for the discrepancies between memory–judgment relationships obtained in existing research are far from clear, and the present research explores this issue further.

A third discrepancy concerns the effects of joinder on perceptions of the

evidence. Tanford and Penrod (1982, 1984) found that joinder increased subjects' perceptions of evidence strength, measured on scales from weak to strong as well as innocence to guilt. On the other hand, Bordens and Horowitz found that ratings of the favorableness of subject-generated thoughts against the defendant did not differ in joined and single trials, although subjects did generate more antidefendant thoughts when charges were joined. The rating method used by Bordens and Horowitz may not have measured subjects' perceptions of evidence strength directly; and, as noted earlier, Bordens and Horowitz employed cases with stronger evidence to begin with, so there may have been less room for an increase in perceptions of its strength. The present research examines the effects of joinder on multiple measures of evidence strength.

THE PRESENT RESEARCH

The objective of the present research was to extend the findings of Tanford and Penrod (1984), and to resolve conflicting findings obtained by other researchers. Tanford and Penrod (1984) obtained significant joinder effects using representative jurors in a realistic trial setting including group deliberation. However, as a result of the effort to achieve a high degree of external validity, Tanford and Penrod did not have sufficient resources to examine a complete factorial design, and in every instance jurors' judgments were on a particular "target" charge that came first in the joined sequence. The present study replicated the conditions employed by Tanford and Penrod (1984) using undergraduates who did not deliberate, and included a number of additional experimental conditions to produce a more complete design.

The study used a full factorial design manipulating charge similarity, evidence similarity, and judges' instructions. From an applied standpoint, similarity was considered an important variable because it is a criterion currently used by the courts as a basis for joinder decisions. From a theoretical perspective, similarity was predicted to influence the three processes of confusion, accumulation, and criminal inference. Although previous research demonstrates that joinder instructions (Greene & Loftus, 1985; Tanford & Penrod, 1984) as well as judges' instructions in other domains (Lind, 1982) tend not to be effective, the legal presumption is that instructions will work; thus the instruction issue continues to be an important one. The present research investigated the possibility that a strong and carefully constructed instruction that did not affect actual jurors (Tanford & Penrod, 1984) might in fact influence undergraduate subjects.

In addition to the target offense control group, single-offense control groups for the second and third charge in each joined condition were included in the design. The additional control groups served two purposes: (1) to examine joinder effects on the other, nontarget charges, and thereby examine the generality of the phenomenon, and (2) to investigate the magnitude of joinder effects as a function of the position of the charge in the joined sequence, as opposed to the first charge only.

METHOD

Subjects. Subjects were 374 undergraduates at the University of Wisconsin who received course credit for participation. The sample was two-thirds female and one-third male, and subjects' mean age was 19 years.

Design. The design of the experiment is presented in Table 1. The study used a 3 (*charge similarity:* identical, similar or dissimilar) × 2 (*evidence similarity:* similar or dissimilar) × 2 *instructions* present or absent) between-subjects design. Each of the 12 experimental (joined) groups contained the same offense (designated the "target offense") in combination with two other offenses that represented the experimental manipulations. In addition, 13 single-case control groups were run, consisting of the target control group (which was the first charge in all joined conditions), six single-case control groups corresponding to the second charge in each joined condition, and six single-case control groups corresponding to the third charge in each joined condition. The content of the control tapes was identical to the content of the offense when presented in the joined trial.

The independent variables were defined as follows: Charge similarity was defined as the type of crime and the circumstances surrounding the crime, where *identical charges* were three service station burglaries, *similar charges* were three burglaries committed at different establishments, and *dissimilar charges* were burglary, assault and armed robbery charges. Evidence similarity was defined as the main evidence presented in each case by the prosecution. For *similar evidence* conditions the evidence for each charge was circumstantial evidence that the defendant was seen driving suspiciously near the scene around the time of the crime with no explanation for his whereabouts. For *dissimilar evidence* conditions the main evidence was different for each charge.

Judges' instructions were defined as special joinder instructions given by the

Table 1. Experimental Design[a]

Single conditions		Joined conditions: Charges — Identical	Similar	Dissimilar	Evidence	
Target control group						
Second charge control groups	B_1 [1] B_2 [2] b_1 [3] b_2 [4] A_1 [5] A_2 [6]	$\underline{B}_1 B_1 B_1$ [1]	$\underline{B}_1 b_1 b_1'$ [3]	$\underline{B}_1 A_1 R_1$ [5]	Similar	No instructions
		$\underline{B}_1 B_2 B_3$ [2]	$\underline{B}_1 b_2 b_3'$ [4]	$\underline{B}_1 A_2 R_3$ [6]	Dissimilar	
$\underline{B}_1^0$						
Third charge control groups	B_1 [1] B_3 [2] b_1' [3] b_3' [4] R_1 [5] R_3 [6]	$\underline{B}_1 B_1 B_1$ [7]	$\underline{B}_1 b_1 b_1'$ [9]	$\underline{B}_1 A_1 R_1$ [11]	Similar	Instructions
		$\underline{B}_1 B_2 B_3$ [8]	$\underline{B}_1 b_2 b_3'$ [10]	$\underline{B}_1 A_2 R_3$ [12]	Dissimilar	

[a] Charge codes: B, burglary (service station); b, burglary (residence); b′, burglary (business); A, assault; R, robbery. Evidence codes: 1, circumstantial evidence; 2, eyewitness identification; 3, other evidence (fingerprints, informant, or stolen property).

judge along with the regular jury instructions at the end of the trial. The instruction was an elaborated and strengthened version of the typical instruction given in actual joined cases. The purpose of the instruction was to alleviate each of the three hypothesized sources of prejudice from joinder. The instruction manipulation was presented by the trial judge as follows (the type of prejudice addressed by each portion is indicated in parentheses):

> 1. The defendant is charged with three counts (of burglary—similar charge conditions) (that is, with the counts of burglary, battery, and armed robbery—dissimilar charge conditions). These are separate crimes and the prosecutor is charging that the defendant committed all of them. The fact that the defendant is charged with more than one crime is not evidence against him. (criminal inference)
> 2. Each charge and the evidence pertaining to it should be considered separately. You should treat the evidence from each charge as separate and distinct. (confusion)
> 3. It is for you to determine whether the defendant is guilty of one, two, three, or none of the offenses charged. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged. In deciding the defendant's guilt or innocence on a particular charge, you should consider the evidence pertaining to that charge only, and you should not consider the evidence from the other two charges. Each count charges a separate crime, and you must consider each one separately. (accumulation)

Stimulus Materials. The same videotaped trial reenactments employed by Tanford and Penrod (1984) were used in the present study. The cases were based on burglary, assault, and armed robbery cases tried in Wisconsin. Two experienced trial attorneys served as the attorneys in the reenactments, and witnesses were student and staff volunteers. Each case was filmed individually at the University of Wisconsin Law School courtroom. The joined conditions were created by editing together combinations of three charges each, all of which contained the same "target" offense (presented first) in combination with two other charges (presented second and third), which represented the experimental manipulations. The joined conditions were presented in the form a joined trial is actually conducted (prosecution opening statements for each of the three charges, defense opening statements, direct and cross-examination of prosecution witnesses for each charge, questioning of defense witnesses, prosecution closing arguments, defense closing argument, judges' instructions). The target offense presented as a single trial constituted the control group for the first charge in each condition, and 12 additional single trial tapes served as controls for the second and third charges (which were different in each condition). Joined trial tapes lasted from 1½ to 2 hours, and single trials lasted from 30 to 45 minutes.

Procedure. Subjects were randomly assigned to one of the 25 experimental conditions, with 11 to 21 subjects per cell (mean n = 15). Subjects viewed the trial videotape in small groups, and following the trial individually completed a posttrial questionnaire which contained the dependent measures. Experimental sessions lasted from 1 to 2½ hours.

Dependent Measures. (1) Manipulation checks—Subjects in joined conditions rated the similarity of the three charges, as well as the evidence contained in the charges, on discrete scales from 1 (highly similar) and 9 (highly dissimilar).

(2) Verdict—Subjects provided a dichotomous verdict preference (guilty or

not guilty). From a legal standpoint, verdict is clearly the most important dependent variable.

(3) Certainty—Subjects rated the degree of certainty in their verdicts on a scale from 1 (extremely uncertain) to 9 (extremely certain).

(4) Evidence recognition—Subjects were given a multiple choice recognition task and were asked to choose which facts were contained in the target charge from among (a) correct items actually contained in the target offense, (b) factual errors about the target offense and (c) items from the other two nontarget charges which were attributed to target offense witnesses ("intrusions"). These items constituted a measure of confusion.

(5) Evidence ratings—Subjects were asked to rate the strength of the evidence for prosecution and defense overall on scales from 1 (very weak) to 9 (very strong). Subjects were also asked to rate the incriminating value of four specific items of evidence for the target charge, two for prosecution and two for defense, on scales from 1 (strongly indicates innocence) to 9 (strongly indicates guilt). The evidence ratings provided a measure of accumulation of evidence.

(6) Defendant ratings—Subjects were asked to rate the defendant on the following eleven 9-point bipolar scales: honest–dishonest, dangerous–not dangerous, likeable–dislikeable, good–bad, sincere–insincere, believable–unbelievable, calm–nervous, moral–immoral, attractive–unattractive, future crime likely–unlikely, a typical criminal–not a typical criminal. The direction of positive and negative poles (1 or 9) was evenly balanced to avoid any response bias. The purpose of these measures was to assess inferences about the defendant's disposition.

RESULTS

Preliminary Analyses

Manipulation Checks. Responses to the charge and evidence similarity ratings were analyzed in 3 (charge similarity) × 2 (evidence similarity) × 2 (instructions) analyses of variance. For the charge similarity rating there was a main effect for charge similarity, $F(2,171) = 15.06$, $p < .001$. The mean ratings for identical, similar, and dissimilar charges were 3.33, 4.13, and 5.25, respectively, where a smaller number indicates greater similarity. There was also a marginally significant instruction effect for charge similarity ratings, $F(1,171) = 3.34$, $p = .07$. Subjects who did not receive the instruction manipulation rated the charges as more similar ($M = 4.0$) than subjects with instructions ($M = 4.46$). For evidence similarity ratings, there was only a marginally significant effect for evidence similarity, $F(1,171) = 2.79$, $p = .10$, which was rated as more similar in similar ($M = 4.07$) than in dissimilar ($M = 4.5$) evidence conditions. There was also a marginally significant charge similarity effect, $F(2,171) = 2.79$, $p = .06$, and a marginal effect for instructions, $F(1,171) = 3.26$, $p = .07$. The mean evidence similarity ratings in identical, similar and dissimilar charge conditions were 3.86, 4.44, and 4.47, respectively, and the mean ratings for no-instructions and instruc-

tions conditions were 4.07 and 4.50. The manipulation checks indicate that the charge similarity manipulation was successful, whereas the evidence similarity manipulation was weak. Therefore, the predicted effects of similarity should hold primarily for charge similarity, and not necessarily for evidence similarity.

Questionnaire Analyses

The effects of joinder on target offense judgments were assessed by comparing the target control group with the mean of the experimental groups using planned contrasts (Keppel, 1982). In addition, target offense judgments in joined conditions only were analyzed in 3 (charge similarity) × 2 (evidence similarity) × 2 (instructions) analyses of variance. All single-joined comparisons for which the hypotheses were directional used one-tailed tests, and the remaining comparisons used two-tailed tests. In addition to analyses on the target offense (which was identical in all conditions) supplemental analyses compared verdicts on the second and third joined offenses with their single-case counterparts. For all analyses, effect sizes (Cohen, 1977) are reported along with significance tests. For *t* tests, the correlation coefficient (*r*) served as the effect size measure, and for *F* tests, the *eta* statistic provided a comparable measure.

Verdicts. Table 2 presents the proportion of guilty verdicts obtained on the target charge in each cell. Analyses were performed on the proportion of guilty verdicts obtained. Although analysis of dichotomous measures may be lower in power than continuous measures, dichotomous measures are appropriate for analysis of variance and regression techniques (Cohen & Cohen, 1983). In terms of ecological validity, analyses of guilty–not guilty verdicts are clearly desirable.

Analyses on the proportions revealed no significant differences between joined conditions and the control group, although in all but one cell the proportion of guilty verdicts in joined, no-instructions conditions was higher than the proportion of guilty verdicts obtained in the control group. The $C \times E \times I$ analysis of variance revealed a significant effect for instructions. $F(1,192) = 4.93$, $p = .03$, $eta = .16$ with fewer guilty verdicts with instructions ($M = .31$) than without ($M = .46$). This result is particularly interesting in light of the results obtained by Tanford and Penrod (1984) in which the same instructions had no effect on representative jurors' judgments.

Table 2. Proportion of Guilty Verdicts—Target Charge

Control group	Charges: Identical	Charges: Similar	Charges: Dissimilar	Evidence	
.35	.53	.57	.20	Similar	No instructions
n = (20)	(17)	(21)	**(15)**		
	.54	.41	.47	Dissimilar	
	(13)	(17)	(17)		
	.29	.41	**.15**	Similar	Instructions
	(14)	(17)	(13)		
	.20	.47	.27	Dissimilar	
	(15)	(15)	(11)		

Also unlike Tanford and Penrod (1984), there was a significant joinder effect for certainty judgments in the present study, $t(192) = 2.01$, $p = .05$, $r = .14$. Subjects in joined conditions expressed more certainty in their verdicts ($M = 7.25$ overall) than subjects in the control group ($M = 6.55$). There was also a main effect for instructions in the $C \times E \times I$ analysis of variance, $F(1,192) = 10.42$, $p < 0.1$, $eta = .23$, which indicated that subjects expressed less certainty with instructions ($M = 6.88$) than without ($M = 7.56$). This suggests that subjects were influenced by judges' instructions, and were as a result less confident that their verdicts were correct.

Additional insight into the certainty results was obtained by examining subjects' certainty as a function of their verdicts (along with the other manipulations) in a 2 (verdict: guilty or not guilty) × 3 (charge similarity) × 2 (evidence similarity) × 2 (instructions) analysis of variance. The instruction effect was again significant, but was qualified by a verdict × instructions interaction, $F(1,136) = 7.15$ ($p = .008$, $eta = .22$. Subjects with guilty verdicts were equally certain with ($M = 7.52$) and without ($M = 7.41$) instructions. However, subjects who voted not guilty were less certain with instructions ($M = 6.46$) than without ($M = 7.63$). The purpose of the instruction was to reduce convictions, and the obtained interaction suggests that this goal was accomplished at the expense of a loss in subject confidence.

Table 3 compares the proportion of guilty verdicts obtained for the second and third charges in joined instructions and no-instructions conditions with the same offense judged as a single trial. Since the content of the charge was different in each experimental condition, analyses were performed on each offense (row of Table 3) individually. With one exception (row 4) there were more guilty verdicts on the second charge in joined than single conditions, particularly without instructions, but only two of these differences were statistically significant. However, the analyses had low power due to small n's of 13 to 21 subjects per cell. The mean joinder effect size across the six cases was .22, indicating that the

Table 3. Proportion of Guilty Verdicts: Charges 2 and 3 Compared to Single Cases[a]

		Joined			
	Single	Cell#	No instructions	Cell#	Instructions
Charge 2	.15[a]	1	.35[a]	7	.21[a]
	.20[a]	2	.54[b]	8	.27[a,b]
	.19[a]	3	.52[b]	9	.35[a,b]
	.43[a]	4	.29[a]	10	.27[a]
	.07[a]	5	.27[a]	11	.38[a]
	.07[a]	6	.24[a]	12	.09[a]
Charge 3	.00[a]	1	.41[b]	7	.21[a,b]
	.00[a]	2	.31[b]	8	.31[b]
	.00[a]	3	.33[b]	9	.00[a]
	.08[a]	4	.35[b]	10	.13[a,b]
	.06[a]	5	.13[a]	11	.00[a]
	.23[a]	6	.35[a]	12	.18[a]

[a] n's = 11 to 21 per cell.
[b] For each row, means without common subscripts are significantly different at $p < .05$.

effect was moderate in magnitude (Cohen, 1977). The strongest joinder effects were obtained for the third charge, particularly in identical and similar charge conditions, in which all four joined no-instructions means were significantly higher than their corresponding controls. In all cases the conviction rate was higher in joined than single conditions, with a mean joinder effect size across the six cases of .28. As was the case for charges 1 and 2, judges' instructions reduced the conviction rate in joined conditions.

Although the present results suggest that joinder effects are stronger on later charges (contrary to Bordens and Horowitz, 1983, and Horowitz et al., 1980), it should be noted that each of the second and third charges was different, so that charge type was confounded with charge position. Thus, the position effects may have been due to the particular charges used, rather than position per se. The more important finding is that joinder effects were obtained on a variety of different charges, demonstrating the phenomenon's generalizability.

Recognition Task. The recognition task required subjects to choose which items were present in the target offense from among four correct items, four incorrect items and eight false recognition items ("intrusions") from nontarget offenses. Analysis of the recognition results was performed on the 12 experimental groups and the target control group only, because the task assessed recognition accuracy on target charge testimony. Overall, subjects were 92% accurate on the correct items, and made 11% factual errors by circling incorrect items. Our primary concern was with intrusions or false recognitions of facts from other cases. There were significantly more intrusions in joined conditions ($M = 1.08$) than there were in the control group ($M = .15$), $t(192) = 3.33$, $p = .001$, $r = .23$. The $C \times E \times I$ analysis of variance yielded a main effect for charge similarity $F(2,191) = 7.57$, $p = .001$, $eta = .27$, and a $C \times E$ interaction $F(2,191) = 5.01$, $p = .01$, $eta = .22$. As predicted, the number of intrusions increased as a function of charge similarity, with means of .79, .90, and 1.56 in dissimilar, similar and identical charge conditions. The nature of the $C \times E$ interaction was examined in an analysis of the simple effect of charge similarity for each level of evidence similarity. There was no effect for charge similarity in dissimilar evidence conditions, $F < 1$, with means of 1.14, 1.26, and 1.29 for dissimilar, similar, and identical charges. The charge similarity main effect was due to a very strong effect for charge similarity in similar evidence conditons, $F(2,94) = 13.13$, $p < .001$, $eta = .47$, with means of .43, .61, and 1.18 for dissimilar, similar, and identical charges, respectively. The results for the recognition task are consistent with those obtained by Tanford and Penrod (1984). Joinder led to some confusion of evidence among charges, confusion increased as a function of charge similarity, and limiting instructions did not affect memory processes.

Evidence Ratings. Four measures of evidence strength were obtained for each subject: (1) prosecution evidence strength overall, (2) defense evidence strength overall, (3) prosecution item sum—the summed incriminating value of two individual pieces of prosecution evidence for the target charge and (4) defense item sum. For the prosecution overall rating, there was a significant joinder effect, $t(192) = 2.26$, $p = .01$, $r = .16$. Subjects in all joined conditions rated the prosecution evidence as stronger ($M = 5.34$) than subjects in the control group

(M = 4.05). The $C \times E \times I$ analysis of variance on the overall prosecution rating yielded a significant charge similarity effect, $F(2,191) = 3.94$, $p = .02$, $eta = .20$, with means of 4.62, 5.72, and 5.44 in dissimilar, similar, and identical conditions. There was also a significant joinder effect for the summed prosecution items, $t(192) = 2.15$, $p = .02$, $r = .15$. Subjects in joined conditions rated specific items of prosecution evidence as more incriminating (M = 12.46), than subjects in the control group (M = 10.8). The instruction manipulation did not affect either prosecution evidence rating.

For the overall defense evidence rating, there were no main effects or interactions for any of the manipulations. For the summed defense items, the joinder effect was not significant, but there was a significant main effect for charge similarity, $F(2,190) = 8.02$, $p < .001$, $eta = .28$ with means of 7.71, 9.51, and 8.03 in dissimilar, similar, and identical charge conditions. There was also a $C \times E$ interaction, $F(2,190) = 3.69$, $p < .05$, $eta = .19$, for which the means in identical, similar, and dissimilar charge conditions were 8.29, 10.03, and 7.00 with similar evidence, and 7.75, 8.87, and 8.84 with dissimilar evidence.

Defendant Ratings. Subjects rated the defendant on eleven 9-point bipolar scales on a number of traits and behaviors. Factor analysis on these ratings yielded two factors. The first factor contained the items honest–dishonest, good–bad, moral–immoral, future crime likely–unlikely, believable–not believable, sincere–insincere, a typical criminal–not a typical criminal, dangerous–not dangerous, and likeable–dislikeble. This can be considered a "criminality–credibility" factor. The second factor had strong positive loadings on the items nervous–calm, attractive–unattractive, and a moderate loading on likeable–dislikeable. This can be considered to be a "global evaluation" factor. For analysis purposes, all items were scaled so that a higher number indicates a less favorable rating.

Analyses on subjects' criminality factor scores revealed a significant joinder effect, $t(355) = 4.42$, $p = .001$, $r = .23$. The defendant was rated less favorably in joined (M = 28.64) than single (M = 26.64) trials. The $C \times E \times I$ analysis of variance yielded a significant main effect for charge similarity, $F(2,355) = 4.72$, $p = .01$, $eta = .16$, and no other main effects or interactions. The defendant was rated less favorably when charges were identical (M = 29.10) or similar (M = 30.48) than when charges were dissimilar (M = 25.99).

The same effects were obtained for the defendant evaluation factor, although they were not as strong. Again, ratings in joined conditions were significantly higher than the control condition ratings (M = 11.34), $t(357) = 3.01$, $p = .002$, $r = .16$. There was a significant main effect for charge similarity on the defendant evaluation factor, $F(2,357) = 3.35$, $p = .04$, $eta = .11$, which indicated that subjects again rated the defendant less favorably when charges were identical (M = 12.67) or similar (M = 12.77) than when they were dissimilar (M = 11.49). Limiting instructions did not affect defendant evaluations, nor did evidence similarity, and there were no interactions among any of the manipulations.

Relationships Among Variables. Table 4 presents the correlations among the main dependent measures: defendant criminality and evaluation scores, prosecution and defense overall evidence ratings, memory intrusions, and verdicts.

Table 4. Correlations Among Dependent Measures

	Criminality	Evaluation	Prosecution	Defense	Memory
Defendant evaluation	.68[a]				
Prosecution evidence	.56[a]	.41[a]			
Defense evidence	−.62[a]	−.38[a]	.60[a]		
Memory	.00	.09	.03	−.00	
Verdict	.56[a]	.42[a]	.69[a]	−.63[a]	.01

[a] $p < .001$.

With the exception of memory, all variables were strongly related to each other. Unfavorable impressions of the defendant were positively related to perceptions of prosecution evidence strength, and negatively related to defense evidence strength. Impressions of the defendant were also positively related to verdicts. Evidence strength was strongly related to verdicts, with a positive relationship for prosecution evidence, and a negative relationship for defense evidence. In previously reported results, the strongest joinder effects were obtained for defendant ratings, and in particular defendant criminality scores. Although correlational, the present results are consistent with the prediction that, to the extent that joinder fosters a negative impression of the defendant, this impression affects perceptions of the evidence and juror verdicts.

DISCUSSION

The present results extend the findings of previous research on joinder, and provide further insight into decision making processes in multiple-offense trials. With a few exceptions, the findings of Tanford and Penrod's (1984) study of deliberating qualified jurors were replicated using nondeliberating undergraduates. Joinder tended to increased the proportion of guilty verdicts relative to single-offense control groups: however, this difference was not significant for the first joined charge, it was significant for two of six charges in the second position, and four of six charges in the third position. The reasons for the weak effects (on the first charge in particular) may have been due in part to low power in the present study, since Tanford and Penrod (1984) obtained significant joinder effects on the same offense in a study that used larger sample sizes.

Because a number of studies have accumulated on joinder effects, a meaningful way to incorporate the present results with previous findings is to combine the results statistically in the manner described by Rosenthal (1978). Table 5 presents a summary of previous and present results. For joinder effects obtained in each study, a mean t value was computed, and a z score corresponding to the exact probability for that value was provided. The mean joinder effect size for each study was also computed. The significance of the overall joinder effect was computed by adding weighted z's, and the resulting Z score of 4.48 was highly significant at $p = .0000035$. Thus, although some of the joinder effects obtained in the present study were weak, the pattern across all studies demonstrates that the finding is a very robust one. Computation of a "file-drawer statistic" (Ro-

Table 5. Summary of Joinder Research Findings

Study	*t*	*df*	*p*	*r*	*z*
Horowitz et al. (1980)	4.57	144	.0005	.36	3.30
Greene & Loftus (1985)					
Study 1	3.14	58	.002	**.38**	2.90
Study 2	2.74	130	.004	**.23**	2.65
Tanford & Penrod (1982)					
Study 1	2.68	80	.005	**.29**	2.58
Study 2	1.64	64	.05	**.20**	1.67
Bordens & Horowitz (1983)	3.32	54	.001	**.41**	3.12
Tanford & Penrod (1984)	2.75	722	.005	**.10**	2.58
Present results					
Charge 1	.23	192	.40	**.02**	.26
Charge 2	1.43	42	.08	**.22**	1.41
Charge 3	1.90	41	.03	.28	1.89
Sum	24.40	1527	.5775	2.49	22.36
Mean	2.44	153	.0577	**.25**	**2.24**

Weighted $Z = 4.48$, $p = .0000035$.

senthal, 1979) revealed that 110 studies with null findings ($z = 0.0$) would be required to bring the finding down to a barely significant probability of .05.

As noted above, the magnitude of joinder effects on verdicts in the present study was influenced by the position of the charge in the joined sequence, with stronger effects obtained for later charges. The position effects run counter to the findings of Bordens and Horowitz (1983) and Horowitz et al. (1980), who found that joinder primarily increased convictions on the first, but not the second, of two joined charges. Greene and Loftus (1985), on the other hand, found that joinder increased convictions equally on charges presented first or second. Although there are some discrepancies among studies, the research demonstrates that the effects of joinder are not limited to charges in a particular position. The differences are likely due to the particular case materials and procedures used by different researchers, and may be partially a function of case strength. In the present study, charge position was confounded with the particular charges used, because the complexity of the materials made it impractical to include every charge in every position. The third charges were somewhat weaker than the first two, so the findings support our earlier speculation that joinder effects are stronger with weaker cases.

The conditions in which significant joinder effects were obtained were exclusively those involving three crimes of the same type, which were either "identical" (three service station burglaries) or similar (three burglaries at different establishments). No significant effects were obtained in dissimilar charge conditions. This finding is consistent with the results of Bordens and Horowitz (1983), who also obtained more convictions when similar charges were joined. The findings are also consistent with research on prior convictions, which demonstrates that a prior conviction for a similar crime is more likely to work against the defendant than is a conviction for a dissimilar crime (Sealy & Cornish, 1973; Wissler & Saks, 1985).

Tanford and Penrod (1984) found that a strong and carefully designed set of

of limiting instructions did not influence qualified jurors' judgments; however, the same set of instructions did significantly reduce convictions in the present study. This finding runs counter to previous joinder research (Greene & Loftus, 1985; Tanford & Penrod, 1982); and indeed, much of existing research in other domains which indicates that limiting instructions tend to be ineffective (Lind, 1982). In the present study, every effort was made to design an effective manipulation by elaborating on the standard instruction, while other researchers generally present the standard instruction as is, or use an artificially derived instruction. The present results indicate that it is possible to design an instruction that will have an effect, although it is important to note the limitations of its effectiveness. First, the instruction influenced undergraduates', but not representative jurors' verdicts. Second, although the instruction did affect verdicts, it did not influence memory, evidence strength ratings, or defendant ratings. Instructions also reduced undergraduates' certainty in their verdicts; primarily when they voted not guilty, suggesting that instructions influenced verdicts at the expense of a loss of subjects' confidence in their decisions.

Support was obtained for each of the three processes hypothesized to operate in joined trials. Joinder led to confusion of evidence, perceptions of stronger prosecution evidence, and negative inferences about the defendant. As in previous research (Tanford and Penrod, 1982, 1984) confusion was unrelated to verdicts. The single exception to this finding is the study by Bordens and Horowitz (1983) in which memory intrusions were related to verdicts. The present findings are consistent with research using other impression formation tasks, which indicates that memory for specific items of information is not strongly related to the overall impression of a stimulus (Anderson & Hubert, 1963; Dreben, Fiske, & Hastie, 1979; Riskey, 1979). Therefore, the bulk of existing research supports the conclusion that confusion is not the key mediating factor in joinder. On the other hand, evidence and defendant ratings were related to verdicts, as well as to each other, consistent with the findings of Tanford and Penrod (1982, 1984). Bordens and Horowitz (1983) also found that evidence ratings were related to guilt judgments, and Greene and Loftus (1985) found that defendant ratings were related to guilt.

The present results are consistent with the prediction that joinder fosters an unfavorable impression of the defendant, which influences perceptions of the evidence as well as verdicts. Other joinder research supports this prediction as well (Greene & Loftus, 1985; Tanford & Penrod, 1982, 1984), although the correlational nature of the findings makes them susceptible to alternative explanations. However, the pattern of relationships obtained is consistent with research by Smith and Miller (1983) using a different impression formation task in which it was possible to specify causal direction. Smith and Miller found that inferences about an actor's disposition occurred prior to judgments about the causes of an event, suggesting that these inferences mediated causal judgments. Research in other jury situations demonstrates that the first information received has a strong influence on jurors' judgment processes, providing further evidence for the importance of initial impressions (Kassin & Wrightsman, 1979; Pyszczynski, Greenberg, Mack & Wrightsman, 1981; Pyszczynski & Wrightsman, 1981).

The existing research on joinder has significance with respect to the methodological issues involved in conducting jury simulation research (Bray & Kerr, 1981; Konecni & Ebbesen, 1979; Lind & Walker, 1979; Weiten & Diamond, 1979). Although there are some discrepancies among studies, significant joinder effects have been demonstrated in a wide variety of experimental settings under varying degrees of realism. The magnitude of the effects varied somewhat among studies; however, a statistical summary of the results of all studies indicated that the joinder effect is a robust one.

The present research demonstrated that the same set of instructions that did not influence the representative jurors in Tanford and Penrod's (1984) study did affect undergraduates; otherwise deliberating jurors' and nondeliberating undergraduates' judgment processes were remarkably similar. Therefore the results suggest that (1) results can be obtained under somewhat artificial laboratory conditions that have implications for more realistic settings but (2) we should nevertheless be cautious in generalizing our results.

With this in mind, we note the practical significance of the present findings. The pervasiveness of joinder effects obtained in experimental settings (from very artificial to very realistic) suggests that the problem is of sufficient magnitude to warrant the attention of the courts. The courts intuitively recognize the potential of prejudice from joinder, and the present research provides empirical evidence as to the psychological processes that may result in prejudice. The law primarily allows for joinder of similar offenses, although the present research indicates that joinder of similar crimes may actually be more prejudicial than joinder of dissimilar crimes. The law also assumes that the traditional limiting instruction will reduce prejudice from joinder, although research suggests that it will not (Greene & Loftus, 1985). Although elaborated instructions did reduce convictions in the present study, they did not with representative jurors (Tanford & Penrod, 1984). The present results are encouraging, since they demonstrate that it is possible to design instructions that work. Future research efforts could be directed towards desiging limiting instructions that effectively reduce judgment biases in the courtroom as well as the laboratory, perhaps by focusing on the psychological mechanisms underlying juror prejudice.

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